IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-550

GEORGE E. FREZZELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

George E. Frezzell, the petitioner herein, prays that a write of certiorari issues to review the judgment of the District of Columbia Court of Appeals entered in the above-captioned matter on May 19, 1978.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (attached hereto as Appendix A, *infra*) affirming petitioner's conviction is not yet reported. The order of

the District of Columbia Court of Appeals denying petitioner's petition for rehearing and/or petition for rehearing en banc (attached hereto as Appendix B, *infra*) is not reported.

JURISDICTIONS

The order of the District of Columbia Court of Appeals (Appendix B, *infra*) denying petitioner's petition for rehearing and/or petition for rehearing en banc was entered on May 19, 1978. On July 31, 1978, Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including October 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment requires disclosure of the existence, identity and statement of an eyewitness favorable to the defense after a general defense request for exculpatory material under *Brady v. Maryland*, 373 U.S. 83.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Admendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put into jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

The petitioner, George E. Frezzell, was charged by an indictment in the District of Columbia Superior Court with first degree murder while armed, first degree murder, and possession of a prohibited weapon, in violation of 22 D.C. Code §§ 3202, 2401 and 3214, respectively. Following a jury trial, petitioner was convicted of first degree murder while armed and possession of a prohibited weapon. He was subsequently sentenced to a term of twenty years to life imprisonment for first degree murder while armed and a term of four to twelve months imprisonment for possession of a prohibited weapon, the terms to run concurrently.

Prior to trial, defense counsel requested the disclosure of exculpatory material pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (T. 8).[1] The government responded that it had no such material, although it was in possession of the name and address of an eyewitness, James Smith, and Smith's statement describing the deceased's assailant. Smith described the culprit as "five foot [seven][2] to five foot nine, sixteen–eighteen years old, a hundred and forty-five–a hundred and fifty pounds, carrying a shotgun in his hand" (Tr. 167-168).[3] At the time of the

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[1] "T." refers to the transcript of the pre-trial proceedings on September 22, 1975, and the balance of the trial, from September 26 to October 1, 1975.

[2] The description turned over to the defense said "five foot seven to five foot nine . . . " but the court report transcribed "five foot eleven". There is no dispute that the court reporter was in error.

[3] "Tr." refers to the transcript of the trial proceedings, beginning September 23, 1975 and ending September 25, 1975.

alleged murder, petitioner was forty years old and six feet tall (Tr. 484).

In the midst of trial, the government reluctantly revealed the name and statement of James Smith to the defense (Tr. 168, 179, 231). At the close of the government's case, defense counsel moved for a mistrial, claiming that the untimely mid-trial disclosure of this information violated *Brady* v. *Maryland*, *supra*. The trial court denied this motion (Tr. 172, 232).

At trial, evidence adduced by the government showed that on January 12, 1975, Phillip Washington was shot to death, shortly after leaving a party at the residence of Joanne Barnes. Co-defendant Robert Price, Jr., Bernard J. Bender, Jimmy Fitzgerald, Joe Champion, petitioner and several others were present at the party (Tr. 45, 305).

The government introduced further testimony that at the party the deceased and petitioner had engaged in an altercation (Tr. 307, 424). Co-defendant Price then ordered Washington to leave the premises. After he departed, Price gave petitioner a shotgun and told him to kill Washington. Minutes later, petitioner re-entered the dwelling, claiming he had shot Washington (Tr. 313, 432). Price then took the gun and placed it in a closet.

Washington's body was subsequently discovered at the rear of 832 Barnaby Street, S.E., Washington, D.C., with a wound inflicted by a shotgun. A firearms expert testified that an expended shotgun shell found near his body had been fired by the shotgun identified as belonging to co-defendant Price (Tr. 88, 116, 162, 214-217).

Joanna Barnes testified that Price had stored a shotgun in the bedroom closet of her apartment (Tr. 112-115, 137). She further stated that the last time she had seen the firearm was on January 10, 1975, two days before the party (Tr. 137). She later discovered that on January

13, 1975, the day after the party, the shotgun had been removed from her bedroom closet and placed in the living room, wrapped in a newspaper. Later that week, she noticed that the gun was no longer in the apartment (Tr. 128-130). Barnes identified in court the shotgun recovered by police as the firearm which Price had stored in her apartment (Tr. 116-136). She also identified an expended shotgun shell found near the body of the deceased as looking like the shells which had been stored with the shotgun (Tr. 130).

A neighbor, residing at 828 Barnaby Street, S.E., testified that on the evening of January 12, 1975, he observed a man exit 836 Barnaby Street carrying what he thought was a rifle and walked to the rear of the building. When the man was no longer in view, he heard a shot and then saw the man re-enter 836 Barnaby Street (Tr. 398-401, 408-410).

Responding to a radio run of the shooting, Detective Robert Flackley went to the scene and found two people standing near the body of the deceased. They identified themselves as Gerald Brown and James Smith (Tr. 162, 166). Smith gave Flackley a statement, including a description of the deceased's assailant (Tr. 167). Detective Flackley put this information in his report (Tr. 168), as did Detective Paul McConnell who arrived later (Tr. 199-200). These reports were made available to the defense prior to the testimony of the officers (Tr. 231). Smith, who had no identification with him, was eventually taken to the police station where he gave a formal statement. The home and business addresses he gave police, however, proved untraceable and he could not be located by the government in advance of trial (Tr. 172-173).

After the government rested, the defense called Joe Champion to the stand. He stated that he was at the party and that no fight took place between the petitioner and the deceased (Tr. 21-22, 48-49). Champion testified

that both he and the petitioner remained at the party after Washington left (Tr. 22-24). He also testified that at no time had he seen a gun displayed at the party (T. 20, 39, 46).

Petitioner testified that he had been present at the party but denied having any argument with Washington (T. 63-64, 66-67, 70). He further stated that he knew nothing about the killing and, in fact, did not learn of Washington's death until the following morning (T. 74).

REASONS FOR GRANTING THE WRIT

The case presents an important but unresolved question of constitutional law: Whether the Due Process Clause of the Fifth Amendment requires disclosure of the existence and identity of an eyewitness favorable to the defense, after a general defense request for exculpatory material under *Brady* v. *Maryland*, 373 U.S. 83. By presenting this issue, this case affords an excellent opportunity for this Court to clarify and delineate prosecutorial duties of disclosure left unresolved by *Brady* and its progeny.

In *Brady*, this Court held that prosecutorial suppression of specifically requested evidence constituted a denial of due process of law where such evidence might have affected a trial's outcome. More recently, in *United States* v. *Agurs*, 427 U.S. 97, this Court ruled that evidence withheld after a general request for *Brady* material must be sufficient to create a reasonable doubt about guilt before a denial of due process will be found. As in *Brady*, the Court in *Agurs* dealt with the suppression of a specific piece of evidence. In the latter case, it was the criminal record of a murder victim allegedly evidencing his violent character. The rule the Court fashioned in *Agurs*, while arguably suitable for analyzing cases where the nature and the extent of the evidence suppressed is known, is manifestly inapposite in cases where the character of such

evidence cannot be fully ascertained. In the instant case, for example, the prosecution suppressed not simply an item but the existence and identity of a critical source of information – an eyewitness to the alleged crime – after a general request for *Brady* material.

Shortly after the death of the deceased, the aforementioned eyewitness gave police a description of the deceased's assailant which was irreconcilable with the physical characteristics of petitioner. Applying the *Agurs* "reasonable doubt" test, the District of Columbia Court of Appeals ruled that this statement was not sufficient to raise a reasonable doubt and denied petitioner's request for a new trial. This decision vividly illustrates the limited utility of the *Agurs* rule. To apply that rule, the court of appeals had to focus on the known evidence—the statement of the eyewitness—to the exclusion of its implications. In other words, it treated this statement as if it were the complete testimony that the eyewitness would have offered had his presence been secured at trial. Clearly, a great likelihood exists that, consistent with the exculpating description he gave police, Smith would have testified that petitioner was not the deceased's killer. His testimony might also have shed some light on the identity of the actual culprit, the circumstances of the killing, and the innocence of petitioner. Such testimony would have shattered the prosecution's strong but purely circumstantial case.

Moreover, assuming arguendo that the court below relied upon the correct standard, it nevertheless reached the wrong result, and consequently denied petitioner due process of law. Indeed, prosecutorial suppression of this particular kind of evidence—the identity and statement of an eyewitness—has been repeatedly and consistently held to be constitutionally impermissible, notwithstanding the

absence of a specific or general defense request for exculpatory material. *Jackson* v. *Wainwright,* 390 F.2d 288 (5th Cir. 1968); *Barber,* v. *Warden, Maryland Penitentiary,* 331 F.2d 842 (4th Cir. 1954); *United States ex rel. Meers* v. *Wilkins,* 326 F.2d 135 (2nd Cir. 1964); *Application of Kapatos,* 208 F. Supp. 883 (S.D. N.Y. 1962). The decision below thus conflicts with a substantial body of federal case law on a question of considerable constitutional significance.

In *Jackson* v. *Wainwright, supra,* the United States Court of Appeals for the Fifth Circuit held that the failure of the government to disclose an eyewitness's statement that the victim's assailant had lighter skin than the accused constituted a denial of due process. Here, the government withheld not only a far more detailed description of the assailant, but the identity of the eyewitness as well.

In *United States ex rel Meers* v. *Wilkins, supra,* the prosecution withheld from the defense the identity and statements of two eyewitnesses to a robbery, although they had stated that they had observed the crime and the three men who had committed it and that the accused was not among them. Notwithstanding the testimony of several witnesses who had positively identified the accused as one of the robbers, the United States Court of Appeals for the Second Circuit held that the suppression was a denial of due process. Judge (now Mr. Justice) Marshall wrote: "it is hard for us to think of any other testimony that might have been more helpful to the defense in establishing its case" than that of witnesses who did not see the defendant. 316 F.2d at 138. In *Meers,* the court relied in part on *Application of Kapatos,* 208 F. Supp. 883 (S.D. N.Y. 1962).

In the *Application of Kapatos, supra,* the prosecution, as in the instant case, failed to disclose the existence and identity of an eyewitness to an alleged murder and the statement he made tending to exculpate the accused. Three eyewitnesses "had observed two persons, neither of whom was the petitioner, escaping from the scene of the crime immediately after he had heard shots . . ." *Id. at* 883. Observing that in light of the evidence adduced at trial "the conclusion that petitioner committed the homicide was almost inevitable," the court nonetheless concluded that the "testimony by an apparently disinterested witness . . . *might well have raised a reasonable doubt in the jury's mind as to the defendant's guilt*" (emphasis added) *Id.* at 888. The court therefore held that the prosecution's failure to disclose the afore-mentioned information constituted a denial of due process.

The decision below is clearly inconsistent with the afore-mentioned cases and, we submit, creates a substantial conflict on a question of considerable constitutional significance which merits resolution by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the District of Columbia Court of Appeals was mailed, postage prepaid, this _____ day of _____, 1978, to Wade H. McCree, Jr., Solicitor General, United States Department of Justice, Room 5143, 9th & Constitution, N.W., Washington, D.C. 20530.

JOEL M. FINKELSTEIN

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10249

GEORGE E. FREZZELL, *Appellant,*

v.

UNITED STATES, *Appellee.*

No. 10322

ROBERT PRICE, JR., *Appellant,*

v.

UNITED STATES, *Appellee.*

APPEALS FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

(Hon. H. Carl Moultrie, Trial Judge)

(Argued September 12, 1977)
(Decided December 14, 1977)

Sanford Z. Berman for appellant Frezzell.

John H. Gullett for appellant Price.

Steven D. Gordon, Assistant United States Attorney, with whom *Earl J. Silbert,* United States Attorney, and *John A. Terry* and *Martin J. Linsky,* Assistant United States Attorneys, were on the brief for appellee.

Before NEWMAN, *Chief Judge,* and MACK and FERREN, *Associates Judges.*

MACK, *Associate Judge:* This is an appeal from appellant Frezzell's conviction of first-degree murder while

armed (D.C. Code 1973 §§ 22-2401, -3202 and possession of a prohibited weapon (*id.* § 22-3214(b)), and apellant Price's conviction of first-degree murder (*id.* § 22-2401) and possession of a prohibited weapon. The appellants allege, *inter alia*, that the government's failure to turn over potentially exculpatory material prior to trial deprived them of due process under the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The facts giving rise to this argument are complex, and will be set out in full.

The government's evidence established that on Sunday, January 12, 1975, the decedent, Phillip Washington, and both appellants were at a party with several other people at an apartment at 836 Barnaby Street, S.E., where appellant Price resided. During the course of the party, appellant Frezzell and Mr. Washington became involved in an altercation and Washington was asked to leave. According to the essentially similar testimony of two of the other people at the party, appellant Price then went to the bedroom closet, took out a shotgun, and said to Frezzell " 'You going to kill him or what.' " Frezzell took the shotgun, left the apartment, and returned approximately ten minutes later saying " 'I just killed [him] and I'll kill anybody in here.' " Price took the shotgun from Frezzell and put it back in the closet.

Phillip Washington's body was found at the rear of 832 Barnaby Street, S.E. His death was caused by multiple injuries from a shotgun wound to the left shoulder and chest. There were no apparent signs of a robbery since his pockets appeared undisturbed and his wallet was still in one pocket. No weapon or fingerprints were found at the scene, but an expended red shotgun shell was found approximately 15 to 20 feet from the body. An expert in firearms examination and toolmark identification stated that as a result of the comparisons he had made, it was

his opinion that the expended shotgun shell found at the scene of the murder had been fired by Price's shotgun. He further stated that while it was impossible to make a definite identification with respect to the shotgun shell pellets and the wadding which were recovered from Washington's body, those pellets and wadding were compatible in all respects with the expended shell found at the scene.

At the time of the murder Mr. Price was staying at 836 Barnaby St. S.E., at the apartment of a Ms. Barnes, who was visiting friends in Maryland. Ms. Barnes testified that Mr. Price had a key to her apartment, and that one or two weeks before the party he had brought a shotgun into the apartment and stored it on the top shelf of the bedroom closet. She also saw two long red shells which were kept at the top of the closet in a small file box. The last time Ms. Barnes saw the shotgun in the closet prior to January 12 was on Friday, January 10. When she returned to the apartment on Monday, January 13, she noticed that the shotgun was no longer in the bedroom closet. She found it in the living room closet wrapped in newspaper, and later in the week noticed that it was no longer in the apartment at all. She did not see the red shotgun shells again after January 12. Several days after the party, the shotgun was cut up and hidden by one of the people who had been present. This person later led the police to the gun, and identified the reassembled shotgun in court. Ms. Barnes was also shown the reassembled shotgun in court, and said that that it looked like the one Price had kept in her apartment. Further, she was shown the expended red shotgun shell recovered from the murder scene, and stated that it looked like the shells she had seen in her apartment.

In addition to the testimony of Ms. Barnes and the two men at the party, there was also testimony by a neighbor,

residing at 828 Barnaby Street, S.E., that he was standing in front of his apartment building on the evening of January 12, 1975, and saw a man come out of 836 Barnaby Street with what he thought was a rifle and walk around to the rear of that building. During the period the man was out of sight the neighbor heard a single shot, and then saw the man run back around the building and reenter 836 Barnaby Street still carrying the gun. The light was dim and the neighbor could only see the man as he came out of the building at 836; thus he could not identify him, but did state that he was a tall, slim black male of about twenty years of age.

Detective Robert Flackley responded to a radio run of the shooting and arrived at the scene to find two people standing by Mr. Washington's body. They identified themselves as Gerald Brown and James Smith. Smith gave Flackley an oral statement including a description of the assailant he observed leaving the scene. Smith described the man as five feet seven to five feet nine, and sixteen to nineteen years of age.[1] Detective Flackley wrote this information on the blank marked "description" on the official police report, which was given to the defense during trial one day prior to his testimony. While Detective Flackley was present at the scene of the murder a radio lookout based on the description given by Smith was flashed by an Officer Clark, who did not testify. Detective Paul McConnell also arrived on the scene and took down the James Smith description as part of his official report, which was turned over to the defense prior to his cross-examination. On such cross-examination Detective McConnell stated that he would have taken notes on any interviews conducted on the scene but that he had been

[1] Appellant Frezzell is six feet tall and forty years old.

unable to locate a notebook covering any notations on January 12, 1975.

At the murder scene James Smith had attempted to leave, and had to be physically restrained and taken downtown to give the formal statement which was made available to the defense. Smith had no corroborative identification on him and could not be located prior to trial, as the home and business addresses he gave proved untraceable.

The trial court refused to allow into evidence the description given by James Smith in the police reports or the substance of the flash lookout on the ground that they were hearsay. The court refused to let either Detective Flackley or McConnell testify as to the substance of any conversations with Smith on the ground that they were also hearsay. The court would not impose sanctions under the Jencks Act[2] or the *Brady* rule for the failure to produce Detective McConnell's notes and denied a motion to dismiss pursuant to *Brady*, ruling that there had been no suppression of Smith's statement by the government, since it was in fact given to the defense, and that *Brady* was therefore inapplicable. The appellants now contend that they were deprived of due process under *Brady* by the failure of the prosecution to produce Smith's statement until midtrial. We disagree with the contention, and affirm the convictions.

[2] Appellants claim that the loss of Detective McConnell's notes warranted the imposition of Jencks Act Sanctions. Even if we assume that Jencks statements were lost, this was of no consequence to appellants. Detective McConnell could not testify with respect to them because of the hearsay problem, and the statement attributed to Smith himself would have been that of a witness who did not testify—a circumstance not invoking the application of the Jencks Act. *See* 18 U.S.C. § 3500 (1970).

The Supreme Court in *Brady* held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good or bad faith of the prosecution. *Id.* at 87. In *Brady*, however, there was a specific request for the material. The prosecutor was made aware of exactly what the defense desired, yet withheld that information until after conviction. Where the defense either makes no request at all, or asks only generally for "all *Brady* material," the prosecutor is not put on notice of what is sought. In clarifying *Brady* the Supreme Court concluded that "there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all." *United States v. Agurs*, 427 U.S. 97, 107 (1976). Thus every nondisclosure cannot be treated consistently as error. *Smith v. United States*, D.C. App., 363 A.2d 667, 668 (1976).

Moreover, a prosecutor does not violate the constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial. *United States v. Agurs, supra* at 108. The proper standard of materiality is whether the omitted evidence creates a reasonable doubt that did not otherwise exist, and the omission must be evaluated in the context of the entire record. *Id.* at 112. While the trial court did not consider the issue of materiality in the instant case, we comment upon the record. Here, where there is the eyewitness testimony of two people present at the party as to the altercation between Frezzell and Washington, and Price's giving Frezzell a shotgun, expert and other testimony linking Price's shotgun to the shooting, and the testimony of the neighbor connecting the person carrying the shotgun with 836 Barnaby Street, it cannot be said that any exculpatory description of a witness who

gave a name and address that could not be traced would have created a reasonable doubt as to guilt.

It would have been better practice for the defense to have been apprised earlier of the fact that there was a witness with potentially exculpatory evidence so that counsel could have attempted to locate Mr. Smith. If he had been present at the trial the information regarding his description would not have been hearsay and would thus have been admissible. However, once the report of Mr. Smith's description was turned over to the defense, it was then incumbent upon counsel to request a continuance in order to make use of the information. No such request was made. *Smith v. United States, supra.*

In view of the special circumstances of this case, including the overwhelming testimonial evidence, the fact that only a general *Brady* request was made, and that the material was turned over to the defense but a continuance was not requested to seek use of the material, we cannot find that the appellant was prejudiced by the preliminary nondisclosure. Furthermore, we have carefully examined the other assignments of error and find them to be without merit.

Affirmed.

DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed May 19, 1978]

No. 10249

GEORGE E. FREZZELL, Appellant,

v. CR 41697-75-A-C

UNITED STATES, Appellee.

BEFORE: *Newman, Chief Judge; Kelly, Kern, Gallagher, Nebeker, Yeagley, Harris, *Mack, and *Ferren, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing and/or petition for rehearing en banc and of the opposition filed with respect thereto, and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED that the en banc petition is denied; and it is

FURTHER ORDERED by the merits division that the petition for rehearing is denied.

PER CURIAM

*Denotes merits division

Copies to:

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